

11 U.S.C. § 328(a)
11 U.S.C. § 330(a)
11 U.S.C. § 348(e)
Contingent Fees

In re Kathleene Jerold Miller District Ct. Case No. 91-6044
Bankr. Case NO. 689-62396-H13

4/08/91 Judge Jones affirming in part unpublished
reversing in part and remanding
an order of PSH

The Bankruptcy court declined to enforce a contingent fee agreement between the Chapter 7 Trustee and his attorney after the case was converted to a Chapter 13. The agreement allowed compensation at the greater of 1.5 times the normal hourly rate or 40% of any actual recoveries to the estate. Alleged fraudulent conveyance claims that the attorney would have had to pursue against the debtor and her family in Chapter 7 were effectively settled post-conversion through full payment under the debtor's Chapter 13 plan. This recovery to unsecured creditors was due primarily to the significant efforts of others, rather than the attorney for the Chapter 7 trustee. The court allowed compensation at the usual hourly rate for services rendered during the Chapter 7 case but disallowed any compensation for the attorney's post-conversion services since his appointment terminated when the Chapter 7 trustee was terminated upon conversion to Chapter 13. On appeal the district court remanded, ruling that once approved by the bankruptcy court, a contingent fee agreement must be enforced unless subsequent developments could not have been anticipated by the court at the time it approved the fee arrangement. Quick settlement of a risky claim with minimal effort by an attorney is always capable of being anticipated. The district court also remanded for a determination of reasonable compensation for post-conversion services. Although the attorney's legal responsibilities ended upon conversion, the bankruptcy court restarted them by specifically involving the Chapter 7 trustee and attorney in various post-conversion proceedings in order to maintain the threat of reconversion to Chapter 7 and subsequent litigation if the Chapter 13 plan did not settle. However, the bankruptcy court did not err in failing to hold an evidentiary hearing on the attorneys's fee request. A hearing on the matter was properly noticed and held and the attorney could have presented evidence at that hearing. The fact that he did not take advantage of this opportunity did not render the bankruptcy court's hearing legally incorrect.

C. - Dresser
Campbell 4-9-91
U.S. DISTRICT COURT
DISTRICT OF OREGON
SOUTHERN DIVISION
FILED

APR 8 1991

DONALD M. CINNAMOND, CLERK
BY *SM* DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re:)
KATHLEENE JEROLD MILLER) Civil No. 91-6044
Debtor.) Bankruptcy No. 689-62396-H13
_____) OPINION AND ORDER

JONES, Judge:

G. Jefferson Campbell, Jr., P.C. (Campbell) appeals the bankruptcy court's order allowing an administrative claim for \$5,232.16 to Campbell. The court has jurisdiction to hear the appeal under 28 U.S.C. § 158.

STANDARD OF REVIEW

This court reviews the bankruptcy court's conclusions of law de novo and reviews the bankruptcy court's findings of fact under the "clearly erroneous" standard. In re Comer, 723 F.2d 737, 739 (9th Cir. 1984) (citations omitted).

"A fee award will be reversed only if the bankruptcy court fails to apply the proper legal standard and procedure, or the award was based on clearly erroneous findings of fact." In re Benassi, 72 B.R. 44, 46 (D. Minn. 1987) (citations omitted).

135

ISSUES ON APPEAL

1. Did the bankruptcy court err in failing to enforce the terms of the court approved contingency fee agreement between the trustee and the trustee's attorney, Campbell?

2. Did the bankruptcy court err in refusing to allow any attorney fees and expenses for Campbell for services rendered and costs advanced after the conversion of the bankruptcy case from chapter 7 to chapter 13?

3. Did the bankruptcy court err in failing to hold an evidentiary hearing on the issue of the application of the contingency fee agreement to the compensation requests of the trustee's attorney and the amount of compensation authorized by the court?

FACTS

On July 20, 1989, the debtor filed a voluntary chapter 7 petition.

On November 13, 1989, the trustee forwarded to the bankruptcy court an application to employ Campbell under the terms of a contingency fee agreement (Agreement). The bankruptcy court approved the application on November 21, 1989.

The Agreement provided that Campbell would receive:

1. 40% of the actual recoveries into the estate; or
2. 1.5 times the normal hourly rates of the attorneys and paralegals of the Trustee's attorney's law firm.¹

¹ According to Campbell, this Agreement was entered into because any monetary recovery might be difficult to obtain and result in large expenses (continued...)

1 On February 9, 1990, Campbell filed an amended application
2 for compensation seeking \$1,658.23 in fees and \$15.46 in expenses
3 under the terms of the Agreement.

4 On March 8, 1990, the debtor filed a motion to convert the
5 case from chapter 7 to chapter 13.

6 At a hearing on April 4, 1990, the bankruptcy court granted
7 the debtor's motion to convert the case to chapter 13. Settlement
8 discussions were ongoing. The case eventually settled.

9 On June 25, 1990, Campbell filed a final application for
10 compensation seeking \$5,827.61 in fees and \$204.85 in expenses for
11 legal services and costs advanced since the February 9, 1990
12 application until the conversion of the case. Campbell also
13 sought \$2,027.63 in fees and \$304.15 in expenses since the
14 conversion of the case to chapter 13.

15 On July 18, 1990, Campbell filed an amended application
16 seeking \$5,617.76 in fees and \$204.85 in expenses for services and
17 costs incurred from February 9, 1990 until conversion of the case
18 and seeking \$3,020.13 in fees and \$570.51 in costs since the
19 conversion of the case to chapter 13.

20 On September 5, 1990, Bankruptcy Judge Higdon filed a letter
21 opinion approving fees and costs of \$5,232.16 for Campbell. Judge
22 Higdon refused to apply the enhanced hourly rate of 1.5 times the
23 standard hourly rate as provided in the Agreement.

24 ¹(...continued)

25 being incurred. Campbell states that "this case was viewed from the outset as
26 a highly speculative case." Previously, another attorney turned down the
trustee's offer of employment because of the speculative nature of the case.

3 - OPINION & ORDER

Judge Higdon further refused to allow any compensation to Campbell for fees and costs after the conversion of the case to chapter 13.

CONTINGENT FEE AGREEMENT

The trustee . . . with the court's approval, may employ or authorize the employment of a professional person . . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under the terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 328(a).

"Whenever special terms and conditions are requested, it is important for the court to focus upon them because, once approved, they are difficult to unravel." In re C & P Auto Transport, Inc., 94 B.R. 682, 685 (Bankr. E.D. Cal. 1988).

The policy behind making it difficult for judges to rewrite compensation contracts is easy to understand. "To deny the fee now because it exceeds time charges and looks high in hindsight would penalize [counsel] for a job well done and would tell [counsel] and all other attorneys that they should think twice before again working for" persons or businesses in bankruptcy proceedings. Benassi, supra, 72 B.R. at 49 (citation omitted).

The legal standard under § 328 requires specific findings why

the fee agreement is "improvident by reason of subsequent developments "unanticipatable," or not capable of being anticipated, at the time" the agreement was entered into by the parties. Matter of Ross, 94 B.R. 210, 216 (M.D. Ga. 1988).

An event is unanticipatable if the judge could not have known at the time of his or her approval of the possibility of the event. In re Churchfield Management & Inv. Corp., 98 B.R. 893, 899 (Bankr. N.D. Ill. 1989).

In the present case, the bankruptcy court applied the incorrect legal standard.

I conclude he [Campbell] is not entitled to 150% of his normal fee because it would be improvident within the meaning of § 328(a) to enforce the chapter 7 fee agreement "in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." See 11 U.S.C. § 328(a). It was actually anticipated that Mr. Campbell expend great effort litigating claims in the chapter 7 case for a very uncertain recovery, not that the case would be quickly converted to chapter 13 and settled through the significant efforts of Mr. Drescher, Ms. Posen, Mr. Dietz and, to a lesser extent, Messrs. Campbell and Grassmueck.

(emphasis added). What was actually anticipated is not the proper legal inquiry. The correct legal inquiry is whether the developments were capable of being anticipated.²

² Judge Higdon cites Matter of Ross, 88 B.R. 471 (Bankr. M.D. Ga. 1988) and In re Allegheny Int'l, Inc., 100 B.R. 244 (Bankr. W.D. Pa. 1989) for support. Neither supports Judge Higdon's conclusion.

Ross was remanded on appeal by the district court with instructions for the bankruptcy court "to make further findings and to apply those findings to the correct legal standard." Matter of Ross, 94 B.R. 210, 216 (M.D. Ga. 1988).

Allegheny dealt with the court modifying indemnification agreements. Allegheny is distinguishable from the present case for two reasons: 1) as the Allegheny court pointed out, § 328, by its plain language, pertains to the (continued...)

1 It cannot be surprising that the debtor moved to convert her
2 case to chapter 13 once Campbell's investigation uncovered hidden
3 assets. Settlement is almost always capable of being
4 anticipated.³ The appellee contends that the event that was not
5 capable of being anticipated was that another attorney, the
6 attorney for the chapter 13 trustee, would perform most of the
7 work. Whatever the reasons, the bankruptcy court must make
8 specific findings why the fee agreement is improvident in light
9 of event not capable of being anticipated at the time the contract
10 was formed.

11 This action is remanded to the bankruptcy court to make
12 findings of fact that are not clearly erroneous and to apply those
13 findings to the proper legal standard.

14 POST-CONVERSION

15 Regarding Campbell's fees and expenses for services performed
16 after the conversion of the case, Judge Higdon stated:

17 I seriously question to what extent Mr. Campbell
18 is entitled by statute to payment from the estate
19 for services performed post-conversion. He was
20 retained only to provide services to the chapter
21 7 trustee in assisting him to carry out his duties.
22 11 U.S.C. § 327(a). After conversion the trustee
23 had no further legal responsibility for the case.

24 ²(...continued)

25 court altering the terms of compensation, not the terms of employment; and 2)
26 the professionals in Allegheny were fiduciaries bound by strict and special
duties.

27 ³ The court in Benassi, supra, 72 B.R. 44 (D. Minn. 1987), rejected the
28 bankruptcy court's view that settlement was an unanticipatable subsequent
development. The court noted that "the large majority of lawsuits . . . are
settled before going to trial." Id. at 49.

1 11 U.S.C. § 348(e). An exception would be payment
2 for services necessary to aid a smooth transition
3 to chapter 13. . . . However, here it appears Mr.
4 Campbell was more involved than necessary in the
5 chapter 13 case after conversion. . . . The court
6 believes Mr. Campbell was largely only responsible
7 to monitor the settlement process carried out by
8 others and maintain the threat of reconversion.

9 Judge Higdon denied all of Campbell's fees and expenses after the
10 case was converted to chapter 13 finding that Campbell was not
11 entitled to post-conversion compensation.

12 The Agreement reached between the chapter 7 trustee and
13 Campbell, approved by Judge Higdon, neither discusses nor mentions
14 what happens in the event of conversion of the case. Nor do the
15 terms of the Agreement limit Campbell's employment during the
16 pendency of the chapter 7 case. The provisions of the Agreement
17 do not provide an answer to whether Campbell is entitled to fees
18 and expenses after the conversion of the case.

19 Title 11 U.S.C. § 348(e), however, provides that
20 "[c]onversion of a case . . . terminates the service of any
21 trustee . . . that is serving in the case before such conversion."

22 Campbell was appointed under 11 U.S.C. § 327(a) which
23 provides that "the trustee, with the court's approval, may employ
24 one or more attorneys . . . to represent or assist the trustee in
25 carrying out the trustee's duties." It logically follows that if
26 the trustee's service is terminated, then the service of the
attorney employed to assist the trustee is also terminated because
the trustee no longer needs assistance.

But after the conversion of the case, the chapter 7 trustee

1 and the chapter 7 trustee's attorney, Campbell, remained involved
2 in the proceeding. As a matter of fact, Judge Higdon specifically
3 involved and addressed Campbell and the chapter 7 trustee
4 throughout the various hearings after the conversion of the case.

5 Judge Higdon further recognized in her letter opinion filed
6 September 5, 1990 that Campbell, after conversion of the case, was
7 "responsible to monitor the settlement process carried out by the
8 others and maintain the threat of reconversion."⁴

9 On one hand, Judge Higdon specifically involved Campbell in
10 the post-conversion proceedings. On the other hand, Judge Higdon
11 denied Campbell compensation for post-conversion services because
12 Judge Higdon found that Campbell's legal responsibilities had
13 ended. While this court agrees that Campbell's legal
14 responsibilities had ended, Judge Higdon made Campbell's legal
15 responsibilities start again. Campbell is entitled to
16 compensation for the work performed and the expenses incurred
17 post-conversion because Judge Higdon asked him to perform those
18 services and incur those expenses.

19 Because this court finds that Campbell had the permission of
20 Judge Higdon to provide services, this court does not reach the
21 question of whether permission is a condition precedent to an

22
23 ⁴ This fact distinguishes the situation of the present case from the
24 situation in In re Rakosi, 99 B.R. 47 (Bankr. S.D. Cal 1989). In Rakosi, the
25 court denied compensation to the chapter 7 trustee's attorney after the case
26 was converted to chapter 13. "The Court . . . holds that E & H acted without
prior court approval and may not assert a claim against the estate under §
330(a) for unauthorized services rendered after the case is converted to
chapter 13." Rakosi, at 50. In the present case, Judge Higdon authorized the
services rendered by Campbell after the conversion of the case.

award of attorney fees and expenses under chapter 13. See In re French, 111 B.R. 391 (Bankr. N.D. N.Y. 1989) ("[B]ecause there is no reference in Code § 327 to Chapter 13, this Court has adopted the position that there is no requirement for court ordered appointment of a professional as a condition precedent to the award of a fee in a case filed under that Chapter.").

Compensation for Campbell for post-conversion fees and expenses is determined by 11 U.S.C. § 330.

[T]he court may award to a . . . professional person employed under section 327 . . .

- (1) reasonable compensation for actual, necessary services rendered by such . . . professional person . . . and by any paraprofessional persons employed by such . . . professional person . . . based on the nature, the extent, and the value of such services, the time spent on such services and the cost of comparable services other than in a case under this title; and
- (2) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a).

This action is remanded to the bankruptcy court to apply the correct legal standard stated in § 330 to Campbell's entitlement to post-conversion fees and expenses.

EVIDENTIARY HEARING

Bankruptcy Rule 9014 provides "[i]n a contested matter in a case under the [Bankruptcy] Code . . . relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." The Advisory Committee Notes states "[i]f a party in interest opposes the amount of compensation sought by a professional, there is a

dispute which is a contested matter."

Bankruptcy Rule 2002(a)(7) provides that "the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of . . . hearings on all applications for compensation or reimbursement of expenses totalling in excess of \$500." Bankruptcy Rule 2002(c)(2) further requires that the notice "identify the applicant and the amounts requested."

The parties dispute whether the hearing on July 31, 1990 was an evidentiary hearing on the issue of Campbell's fee application. Campbell contends that it was not because specific notice was required, because the July 31 hearing was merely a continuation of the June 28 hearing, and because Campbell did not have an opportunity to present witnesses, cross-examine, or introduce evidence. Further, Campbell contends because the chapter 7 trustee was in Hawaii, the July 31 hearing cannot be deemed a sufficient evidentiary hearing.

On July 10, 1990, the deputy clerk of the bankruptcy court gave notice of a hearing. The notice stated the hearing's purpose:

to consider and act upon the following:

Debtor's Objection to Application of Chapter 7 Trustee and Trustee's Attorney for Final Compensation; and Objection to Fee Application of Debtor's Attorney, Objection to Chapter 7 Trustee's Attorney's Fee and Objection to Application of Chapter 7 Trustee's Attorney for Final Compensation by Kenco Lease, Inc.

Campbell received specific notice of what was to be

1 discussed at the July 31, 1990 hearing. The notice identified
2 the applicant, the chapter 7 trustee's attorney. Although the
3 notice failed to identify the amounts requested, the defect was
4 not fatal. The notice stated that the purpose of the meeting was
5 "to consider and act upon the . . . [a]pplication of [the]
6 [c]hapter 7 [t]rustee's [a]ttorney for [f]inal [c]ompensation."

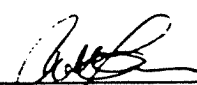
7 The bankruptcy court complied with Bankruptcy Rule
8 2002(a)(7) & (c)(2) by giving proper notice twenty days before
9 the hearing on the fee application. The bankruptcy court
10 complied with Bankruptcy Rule 9014 because the bankruptcy court
11 gave Campbell notice and an opportunity to be heard. The fact
12 that Campbell failed to take advantage of this opportunity does
13 not render the bankruptcy court's hearing legally incorrect.

14 The bankruptcy court did not err in failing to hold an
15 evidentiary hearing on the issue of Campbell's compensation.

16 CONCLUSION

17 The decision of the bankruptcy court is AFFIRMED in part and
18 REVERSED in part and REMANDED for proceedings consistent with
19 this opinion.

20 DATED this 8th day of April, 1991.

21
22
23 
24 ROBERT E. JONES
25 United States District Judge
26

C. Campbell
Drecher 4-11-91
U.S. DISTRICT COURT
DISTRICT OF OREGON
SOUTHERN DIVISION
FILED
ENTERED
APR 11 1991

DONALD M. CINNAMOND, CLERK
BY *Sn* DEPUTY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re:)
KATHLEENE JEROLD MILLER,) Civil No. 91-6044-JO
Debtor.) Bankruptcy No. 689-62396-H13
JUDGMENT

The decision of the Bankruptcy Court is affirmed in part and reversed in part and remanded to the bankruptcy court.

DATED: April 11, 1991.

DONALD M. CINNAMOND, CLERK
by *Dan Marsh*
Dan Marsh, Deputy Clerk

JUDGMENT